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IN THE

Supreme Court of the United States

GRANT M. WALKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, ET AL.,

Petitioners,

v.

MONSANTO COMPANY PENSION PLAN, ET AL.,

Respondents.

(for continuation of caption see inside cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Petitioners,

v.

SOLUTIA INCORPORATED EMPLOYEES PENSION PLAN, ET AL.,

Respondents.

FRED DONALDSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, ET AL.,

Petitioners,

v.

PHARMACIA CASH BALANCE PENSION PLAN, ET AL.,

Respondents.

QUESTION PRESENTED

Whether a cash balance pension plan's discontinuation of certain interest credits when "the Participant attains age 55" violates ERISA's prohibition against ceasing or reducing an employee's benefit accrual "because of the attainment of any age."

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a – 17a) is reported at 614 F.3d 415. The opinion of the district court (Pet. App. B, 18a – 40a) is reported at 636 F.Supp. 2d 774.

JURISDICTION

The court of appeals filed its opinion on July 30, 2010. The court of appeals denied a Petition for Rehearing on September 14, 2010. (Pet. App. D, 48a – 49a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

ERISA § 204, 29 U.S.C. § 1054; Notice 96-8, IRS Notice 96-8, "Cash Balance Pension Plans," 1996-1 C.B. 359 (Feb. 5, 1996); Rev. Rule. 2008-7, 2008-7 I.R.B. 419, 2008 WL 274325; 53 Fed. Reg. 11,876 (Apr. 11, 1988); and 67 Fed. Reg. 76,123 (Dec. 11, 2002), along with the other relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

STATEMENT OF THE CASE

This case provides the Court with the opportunity to resolve a newly created circuit conflict regarding the interpretation of the statutory term "benefit accrual" appearing in ERISA Section 204(b)(1)(H)(i), as applied to defined benefit plans with cash balance formulae. The Seventh Circuit incorrectly interprets "benefit accrual" in the present case in a manner that conflicts with its own decision in *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006), and also with several other United States Courts of Appeals' decisions following *Cooper*'s interpretation of the term "benefit accrual" as applied to cash balance plans, including *Register v. PNC Financial Services Group, Inc.*, 477 F.3d 56 (3d Cir. 2007), *Drutis v. Rand McNally & Co.*, 499 F.3d 608 (6th Cir. 2007), and *Hurlic v. Southern California Gas Co.*, 539 F.3d 1024 (9th Cir. 2008). The resolution of this conflict has a profound effect on all employers, sponsors, and employees who participate in benefit plans governed by ERISA, and is necessary to secure and maintain uniformity of the circuits' decisions and the integrity of ERISA's regulatory scheme.

1. Statutory and Regulatory Background

ERISA prohibits a defined benefit plan from ceasing or reducing an employee's benefit accrual because of the attainment of any age. 29 U.S.C. § 1054(b)(1)(H)(i) (stating that a defined benefit plan does not meet the requirements of ERISA if "an employee's benefit accrual is ceased, or the rate of any employee's benefit accrual is reduced, because of the attainment of any age"). ERISA also prohibits the forfeiture of benefits

and requires that "in determining the accrued benefit of a participant under a cash balance plan at any time prior to normal retirement age, the balance in the cash balance plan must be projected with interest credits to normal retirement age." Rev. Rule. 2008-7, 2008-7 I.R.B. 419, 2008 WL 274325.

In *Cooper v. IBM Personal Pension Plan*, the Seventh Circuit stated that "benefit accrual" is "a phrase dealing with inputs (either in absolute terms or as a rate of change)" and should be read "as a reference to what the employer puts in" or "imputes to the account." 457 F.3d 636, 638-39 (7th Cir. 2006). The Seventh Circuit also explained in *Cooper* that its interpretation of "benefit accrual" as a reference to the employer's contribution to a participant's account has the support of regulations proposed by the Treasury Department, which define the phrase "benefit accrual" as '"the additions to the participant's hypothetical account for the plan year."' *Id.* at 649 (quoting 67 Fed. Reg. 76123, 76125-26 (Dec. 11, 2002)).

All other Circuits to have considered the issue have adopted similar interpretations of "benefit accrual" in this ERISA context. For example, in *Register v. PNC Financial Services Group, Inc.*, the Third Circuit stated:

> [C]ash balance plans define the benefit in terms of a stated account balance . . . . Thus, the "benefit" as used in the phrase "benefit accrual" refers to the stated account balance as that is how the benefit is defined by cash balance plans. Once this proposition is

> grasped, it becomes clear that the "accrual" of "benefit" in section 1054(b)(1)(H)(i) refers to the credits deposited into the participant's cash balance accounts, *i.e.*, the inputs.

477 F.3d 56, 68-69 (3d Cir. 2007). *Accord Drutis v. Rand McNally & Co.*, 499 F.3d 608, 612-15 (6th Cir. 2007) ("[T]he term 'benefit accrual' as used in § 1054(b)(1)(H)(i) refers to the employer's contribution to the defined benefit plan."); *Hurlic v. Southern California Gas Co.*, 539 F.3d 1024, 1037 (9th Cir. 2008) ("The term 'accrue' means 'to increase.' . . . 'Benefit accrual' thus refers to the process by which benefits increase. . . . Under the cash balance plan, benefits increase as the employer credits the account with earnings and interest credits.").

Similarly, the Treasury Department in 1988 published proposed regulations to implement the Internal Revenue Code's parallel provisions to those of ERISA at issue here. *Compare* 29 U.S.C. § 1054(b)(1)(H) and 29 U.S.C. § 1054(b)(2), *with* 26 U.S.C. § 411(b)(1)(H) and 26 U.S.C. § 411(b)(2). As the Treasury Department explained:

> The proposed regulations provide that the rate of an employee's benefit accrual under a defined benefit plan or the rate of allocations to an employee's account under a defined contribution plan will be considered to be reduced on account of the attainment of a specified age if optional forms of benefits, ancillary benefits or other benefits, rights or features under a plan that are provided with respect to benefits or allocations prior to such

> age are not provided (on terms that are at least as favorable to employees) with respect to benefits or allocations after such age.

53 Fed. Reg. 11,876, 11,877 (Apr. 11, 1988). Thus, the Treasury Department has interpreted the statutory phrase "benefit accrual" quite broadly, *i.e.*, to encompass any optional form of benefit, ancillary benefit or other benefit, right or feature under a plan, and confirmed that any termination or reduction of any such benefit, right or feature on account of the attainment of any age is prohibited. *See id.*

2. Factual Background

Effective January 1, 1997, Monsanto Company ("Old Monsanto") converted its traditional defined benefit plan to another form of defined benefit pension plan known as a cash balance plan. After the conversion, there were a number of corporate spin-offs and restructurings that resulted in Old Monsanto becoming three separate corporations – namely, Pharmacia Corporation ("Old Monsanto" or "Pharmacia"), Solutia Inc. ("Solutia"), and a newly-created Monsanto Company ("New Monsanto"). As a result, there are three substantially identical cash balance pension plans: (1) the Pharmacia Cash Balance Pension Plan (the "Pharmacia Plan"), sponsored by Pharmacia, (2) the Solutia Inc. Employees' Pension Plan (the "Solutia Plan"), sponsored by Solutia, and (3) the Monsanto Company Pension Plan (the "Monsanto Plan"), sponsored by New Monsanto.

This case involves identical provisions in the Pharmacia, Solutia and Monsanto Plans. Because the relevant provisions are identical, the parties have referred to all of these plans collectively simply as "the Plan."

The Plan is structured around the formation and maintenance of two Accounts for each Participant: a Cash Balance Account and a Prior Plan Account (sometimes referred to herein as the "PPA"). Petitioners are not challenging any aspect of the Plan's Cash Balance Account.

The initial account balance for a Participant's PPA was established pursuant to a conversion formula set forth in the Plan whereby a Participant's PPA is "credited with an amount equal to the Actuarial Equivalent lump sum value of the Participant's Predecessor Plan Accrued Benefit (as defined in [Paragraph 6.2(b)]), discounted using an interest rate of eight and one-half percent per annum for each month, if any, by which the Participant's age as of January 1, 1997 precedes age 55." (Plan § 6.2(b)).

Once established, the PPA's initial account balance increases monthly in the form of Pay Credits and Interest Credits. As long as a Participant is an Eligible Employee or Qualified Disabled Terminated Employee, the Participant's PPA is credited monthly with Pay Credits equal to the balance of the Prior Plan Account on the first day of the month multiplied by 0.003274 (the monthly equivalent of 4% per annum). The PPA is also credited each month with Interest Credits equal to the sum of (i) the balance of the Prior Plan Account on the

first day of such month, and (ii) the Participant's Pay Credits for that month, if any, multiplied by 0.006822 (the monthly equivalent of 8.5% per annum). (Plan §§ 6.2(c) (Pay Credits), 6.2(d) (Interest Credits).

The Plan, however, explicitly conditions a Participant's right to receive these Interest Credits to his Prior Plan Account on the Participant being under age 55. Under the Plan's express terms, Interest Credits contributed to a participant's Prior Plan Account cease because "the Participant attains age 55." (Plan § 6.2(d)).

To further illustrate the operation of the Plan's PPA Interest Credits and Pay Credits, consider, for example, that an age 54 (or younger) participant that is a current employee will have both monthly Pay Credits and Interest Credits contributed to his PPA. These monthly Interest Credits for a participant age 54 (or younger) will apply to the participant's entire PPA balance, including increases to that account attributable to the monthly Pay Credits. However, if that participant remains employed after attaining age 55, he will continue to receive monthly Pay Credits to his PPA; but solely because he attained the age of 55, he will no longer receive any Interest Credits to the PPA, including the increase to the PPA attributable to monthly Pay Credits contributed after he attained age 55. Thus, under the Plan, post-age 55 Pay Credits do not have any Interest Credits added to them, while pre-age 55 Pay Credits do have Interest Credits added to them, but only to age 55. (Plan §§ 6.2(c), 6.2(d)).

The Plan's provision explicitly ceasing the monthly PPA Interest Credits because "the Participant attains age 55" is also reflected in the Plan's calculation of a Participant's Accrued Benefit. Under the Plan's terms, "[a] participant's monthly Accrued Benefit is a single life annuity commencing at Normal Retirement Age equal to the quotient of (a) the Participant's current Accounts plus interest credits added to the Prior Plan Account through age 55 pursuant to Section 6.2(d) and interest credits added to the Cash Balance Account through Normal Retirement Age pursuant to Section 6.3(d) divided by (b) 125." (Plan § 3.2). The Plan defines Normal Retirement Age as age 65. (Plan § 3.36).

The Plan does not contain an early retirement benefit formula, as confirmed by the absence of any such term in the Plan itself and Defendants' own admission in the form of a sworn statement to the IRS, (*see* Application for Determination for Employee Benefit Plan, IRS Form 5300 ("Benefit formula at early retirement age is NO EARLY RETIREMENT BENEFIT FORMULA.").

Defendants' own proffered ERISA expert has never seen or even heard of a cash balance plan that terminates any type of interest credit in the same manner as this Plan.

Petitioners, individually and on behalf of the certified Age 55 Cut-Off Classes, allege that by ceasing the monthly Interest Credits to a Participant's Prior Plan Account because "the Participant attains age 55," the Plan violates ERISA's prohibition against ceasing or reducing an employee's benefit accrual because of

the attainment of any age. Petitioners also allege that an impermissive forfeiture occurs because the Plan calculates a Participant's Accrued Benefit by reference to the continuation of PPA Interest Credits only "through age 55 pursuant to Section 6.2(d)," as opposed to the Plan's Normal Retirement Age (*i.e.*, age 65).

3. Proceedings Below

The origin of the underlying consolidated class action lawsuit is Petitioners' Complaint filed on June 23, 2004 in the United States District Court for the Southern District of Illinois, *Walker v. Monsanto Company Pension Plan*, Case No. 04-436. On September 1, 2006, the district court entered an Order consolidating the *Walker* action with the following three related actions: *Hammond v. Solutia, Inc. Employees' Pension Plan*, Case No. 06-139 (S.D. Ill. filed 2/15/2006); *Davis v. Solutia, Inc. Employees' Pension Plan*, Case No. 05-736 (S.D. Ill. filed 10/12/2005); and *Donaldson v. Pharmacia Pension Plan*, Case No. 06-3 (S.D. Ill. filed 1/3/2006). Petitioners filed their Consolidated Class Action Complaint on September 1, 2006. The Consolidated Class Action Complaint alleges (among other things) that Defendants' substantively identical cash-balance defined benefit plans violate ERISA's prohibition against ceasing or reducing an employee's benefit accrual because of the attainment of any age and results in an impermissive forfeiture.

On May 22, 2008, the district court certified the three identical "Age 55 Cut-Off claims" (Counts I, II and III of the Consolidated Class Action Complaint) against the Monsanto, Solutia and Pharmacia Defendants.

On June 11, 2009, the district court granted Defendants' motion for summary judgment on Petitioners' Age 55 Cut-Off claims (Counts I, II and III of the Consolidated Class Action Complaint) and denied Petitioners' cross-motion for summary judgment on those same claims. The district court held that there were no factual disputes before the court in relation to Counts I, II and III, and that Defendants' Plan did not, as a matter of law, violate ERISA. After additional proceedings necessary to resolve another claim (Count X) on which the district court granted Petitioners' cross-motion for summary judgment on the issue of liability against the Monsanto Defendants, the district court entered final judgment disposing of all of the claims with respect to all parties on September 29, 2009. (Pet. App. C, 40a – 47a). Petitioners timely filed their joint notice of appeal on October 27, 2009.

On July 30, 2010, the circuit court affirmed the district court's grant of summary judgment to Defendants. (Pet. App. A, 1a – 2a). The circuit court found that the Interest Credits as issue were not additions to the participant's hypothetical account for the plan year, but rather act to reverse early retirement discounts. *Id.* at 10a – 11a. Based upon this finding, the circuit court held that the Interest Credits which ceased upon attainment of age 55 were not part of the participant's "benefit accrual" because they had "no impact on the accrued benefit at normal retirement age" or "effect on an employee's rate of benefit accrual." *Id.* at 15a. Petitioners timely filed their joint petition for rehearing and petition for rehearing en banc on August 13, 2010.

On September 14, 2010, the circuit court denied Petitioners' petition for rehearing and petition for rehearing en banc. (Pet. App. D, 48a – 49a). The circuit court issued its mandate on September 22, 2010.

REASONS FOR GRANTING THE PETITION

The Court should grant Certiorari in order to correct the Seventh Circuit's erroneous interpretation of the ERISA phrase "benefit accrual" in a manner that conflicts with interpretations from the three other Circuits which have defined that phrase, with a prior decision of the Seventh Circuit itself, and with guidance from the Treasury Department

The Seventh Circuit opinion in this case creates a conflict among the Circuits regarding the definition of a statutory phrase, "benefit accrual," which relates to a core protection provided by ERISA. ERISA does not allow defined benefit pension plans to cease or reduce an employee's benefit accrual because of the attainment of any age. 29 U.S.C. § 1054(b)(1)(H)(i) (stating that a defined benefit plan does not meet the requirements of ERISA if "an employee's benefit accrual is ceased, or the rate of any employee's *benefit accrual* is reduced, because of the attainment of any age") (emphasis added). In the present case, the Monsanto Plan expressly terminates PPA Interest Credits when "the Participant attains age 55." (Plan § 6.2(d)). According to the Seventh Circuit, the discontinuation of PPA Interest Credits at age 55 does not violate ERISA's prohibition against the cessation or reduction of pension benefit accrual "because of the attainment of any age," because, the Seventh Circuit concluded, the Interest Credits "are

not benefit accruals." 614 F.3d at 420. This conclusion is directly contrary to what had been a uniform definition of "benefit accrual" by all the Circuits (including the Seventh Circuit itself) that had considered this issue, as well as with longstanding guidance from the Treasury Department.

Prior to the present case, every Circuit which had considered the meaning of the ERISA's phrase "benefit accrual" as applied to cash balance plans had broadly construed benefit accrual as encompassing everything credited to a cash balance account. The Third Circuit explained:

> [C]ash balance plans define the benefit in terms of a stated account balance . . . . Thus, the "benefit" as used in the phrase "benefit accrual" refers to the stated account balance as that is how the benefit is defined by cash balance plans. Once this proposition is grasped, it becomes clear that the "accrual" of "benefit" in section 1054(b)(1)(H)(i) refers to the credits deposited into the participant's cash balance accounts, *i.e.*, the inputs.

Register v. PNC Financial Services Group, Inc., 477 F.3d 56, 68 (3d Cir. 2007). The Ninth Circuit reached the same conclusion: "The term 'accrue' means 'to increase.' . . . 'Benefit accrual' thus refers to the process by which benefits increase. . . . Under the cash balance plan, benefits increase as the employer credits the account with earnings and interest credits." *Hurlic v. Southern California Gas Co.*, 539 F.3d 1024 (9th Cir. 2008). The Sixth Circuit agreed: "[T]he term 'benefit accrual' as

used in § 1054(b)(1)(H)(i) refers to the employer's contribution to the defined benefit plan." *Drutis v. Rand McNally & Co.*, 499 F.3d 608 (6th Cir. 2007). The Seventh Circuit itself had concluded that "[t]he phrase 'benefit accrual' reads most naturally as a reference to what the employer puts in" and should be thought of "as referring to what the employer imputes to the account." *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006).

Treasury Department regulations proposed in 2002 offered a similar definition of "benefit accrual:" "For cash-balance plans in particular the phrase would have been defined as 'the additions to the participant's hypothetical account for the plan year.'" 67 Fed. Reg. 76,123, 76,126 (Dec. 11, 2002) (*quoted in Cooper*, 457 F.3d at 639). Although the Seventh Circuit panel that decided the present case involving the Monsanto cash balance plan rejected the Treasury Department's 2002 effort to provide guidance specific to cash balance plans and instead defaulted to the guidance generally applicable to any defined benefit plan, the panel inexplicably ignores the broad definition of the ERISA phrase "benefit accrual" in regulations which the Treasury Department proposed in 1988. In the 1988 proposed regulations, the Treasury Department interpreted ERISA's use of "benefit accrual" quite broadly to encompass any optional form of benefit, ancillary benefit or other benefit, right or feature under a plan, and confirmed that any termination or reduction of any such benefit, right or feature on account of the attainment of any age is prohibited.[1]

1. "The proposed regulations provide that the rate of an employee's benefit accrual under a defined benefit plan or the rate of allocations to an employee's account under a defined (Cont'd)

Given the until-now uniform understanding of benefit accrual as encompassing all credits to a cash balance account, the only inquiry relevant to analyzing whether ERISA prohibits ceasing or reducing any particular benefit has been "'if this employee were younger, would the hypothetical balance have grown more this year?'" *Cooper*, 457 F.3d at 640 (*citing* 2002 proposed Treasury regulations). In this case, the answer is clearly yes – the hypothetical balance in the PPAs of Monsanto Plan participants would grow more during every year that participants are younger than 55 and grow less in every subsequent year. An employee age 54 or younger will receive Interest Credits (at an annual rate of 8.5%) on his Prior Plan Account – resulting in an increase to the participant's hypothetical account balance during each year the employee is age 54 or younger. Upon attaining age 55, however, this same employee will no longer receive any increase to his Prior Plan Account from these Interest Credits because the Plan explicitly terminates these Interest Credits upon the attainment of the specified age of 55 (*i.e.*, because "the Participant attains age 55").

The Monsanto Plan's expressly age-based termination of benefit accruals violates ERISA's prohibition of the cessation or reduction of benefit

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(Cont'd)
contribution plan will be considered to be reduced on account of the attainment of a specified age if optional forms of benefits, ancillary benefits or other benefits, rights or features under a plan that are provided with respect to benefits or allocations prior to such age are not provided (on terms that are at least as favorable to employees) with respect to benefits or allocations after such age." 53 Fed. Reg. 11,876, 11,877 (Apr. 11, 1988).

accrual because of the attainment of any age. One Circuit Court has cited this very fact pattern as a clear ERISA violation for that reason. In *Hurlic*, the Ninth Circuit noted: "For example, the Plan would clearly be in violation of ERISA § 204(b)(1)(H)(i) if it provided that when participants reached age 50 [or any other specified age], they stopped receiving benefits or began accruing benefits at a reduced rate." 539 F.3d at 1031-32.

The Seventh Circuit's conclusion that the PPA Interest Credits at issue in the present case "are not benefit accruals . . . because they never increase the accrued benefit at retirement," 614 F.3d at 419, is clearly erroneous. The explicitly age-based cessation of PPA Interest Credits at age 55 directly impacts the Accrued Benefit offered by the Monsanto Plan because that age-based cessation is actually baked right into the Monsanto Plan's definition of Accrued Benefit. The Monsanto Plan defines the "Accrued Benefit" in terms of an annuity calculated as a ratio whose numerator improperly incorporates the illegal cessation of PPA Interest Credits at age 55.[2] If, as Petitioners contend, the Monsanto Plan must be reformed to eliminate this age-based discrimination and maintain PPA Interest

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2. Section 3.2 of the Monsanto Plan defines "Accrued Benefit" as:

> [a] participant's monthly Accrued Benefit is a single life annuity commencing at Normal Retirement Age equal to the quotient of (a) the Participant's current Accounts plus interest credits added to the Prior Plan Account through age 55 pursuant to Section 6.2(d) and interest credits added to the Cash Balance Account through Normal Retirement Age pursuant to Section 6.3(d) divided by (b) 125.

Credits through the normal retirement age of 65, every participant's Accrued Benefit would greatly increase, because the accrued benefit would then include an additional ten (10) years of 8.5% interest credits on each participant's PPA balance.

In addition to ignoring the Monsanto Plan's definition of Accrued Benefit as an annuity with an illegal, age-based cap that must be eliminated, the Seventh Circuit's conclusion that PPA Interest Credits never increase the Monsanto Plan's Accrued Benefit also reflects the Seventh Circuit's erroneous assumption that the balance in the PPA necessarily represents the maximum value of the pension benefit that a participant may claim as a lump sum. This erroneous assumption is apparent from the Seventh Circuit's interchangeable references to the Accrued Benefit and the PPA balance – both of which equal a maximum of $125,000 in the Seventh Circuit's hypothetical.

The Seventh Circuit evidently fails to recognize that reforming the Monsanto Plan to increase the value of the annuity which the Monsanto Plan defines as the Accrued Benefit would require a corresponding increase for participants who choose to take their pension benefits in the form of an optional lump sum. "ERISA requires that any lump-sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit." *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 759 (7th Cir. 2003). The Monsanto Plan tracks this ERISA requirement by providing that any lump sum distribution of pension benefits must equal at least "the lump sum Actuarial

Equivalent of Participant's Accrued Benefit." Plan § 7.3, Option 4. While the Monsanto Plan may have designed the PPA to be the actuarial equivalent of the Accrued Benefit if PPA Interest Credits illegally discontinued at age 55, PPAs unquestionably are *not* the actuarial equivalent of the Accrued Benefit reformed to exclude the illegal discontinuation of PPA Interest Credits at age 55 and instead make those Interest Credits available through the Plan's Normal Retirement age of 65. So the Seventh Circuit's hypothetical concluding that PPA Interest Credits could never exceed $125,000 is inaccurate.

The Seventh Circuit's focus on the accrued benefit that participants had presumably earned under Defendants' prior traditional defined benefit plans is also misplaced because those plans ceased to exist upon Defendants' conversion of those plans to the new cash balance plan at issue. This case is not about a participant's accrued benefit under Defendants' prior, discontinued plans, but rather concerns whether Defendants' new cash balance, defined benefit plan complies with the benefit accrual rules specifically applicable to cash balance plans.

Moreover, the current Monsanto Plan's illegal discontinuation of PPA Interest Credits at age 55 wrongfully ceases the accrual of benefits in the form of interest on the PPA Pay Credits, all of which (Pay Credits) were all earned on the basis of continued employment *after* conversion to the cash balance plan in 1997. Although the Seventh Circuit correctly designates the Pay Credits as a benefit accrual, the Seventh Circuit loses sight of the incontrovertable fact that the Interest Credits on the Pay Credits are necessarily a benefit accrual as well. Neither the Pay

Credits nor the Interest Credits on the Pay Credits were part of a participant's accrued benefit as of the date Defendants converted their prior pension plans to the new cash balance plan at issue in this case. The Pay Credits are a new benefit accrual that an employee earns for each subsequent month of employment after the conversion date. *See Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 832 (S.D. Ind. 2000) (explaining that a credit to a cash balance plan that is conditioned on continued employment accrues year by year as the participant continues to work). The Interest Credits on the Pay Credits, like the Pay Credits themselves, similarly constitute a new benefit accrual as they specifically attach to the increase in the value of the participant's account attributable to the Pay Credits. *See id.*

Whatever motives may have prompted Defendants to create a cash balance plan with an illegal, age-based cessation of benefit accruals, the apparent effort to rationalize the Monsanto Plan as a cash balance plan that is not subject to the rules applicable to other defined benefit, cash balance plans finds no support in the case law, the statute, or any pronouncement of the Treasury Department or the Internal Revenue Service through regulation, revenue ruling or otherwise. Although even Defendants' own retained actuarial experts have never heard of another ERISA plan with a facially age-discriminatory negative effect on benefits, the unprecedented and anomalous definition of "benefit accrual" which the Seventh Circuit adopted in this case has the potential to wreak havoc with a core ERISA protection. The Court should grant certiorari in order to restore the previously uniform interpretation of benefit accrual which had protected ERISA participants from discrimination and provided certain guidance to ERISA sponsors and administrators.

Finally, the Seventh Circuit is mistaken when it asserts that "Petitioners' argument, if adopted, would treat all discounted early retirement programs as violations of § 1054(b)(1)(H)(i)." 614 F.3d at 421. Petitioners have no quarrel with early retirement discounts in defined benefit plans. Petitioners have never contested the Monsanto Plan's right to discount the opening PPA balance for participants younger than 55 at conversion. Petitioners have always focused instead on the Monsanto Plan's failure to comply with ERISA's absolute requirement to give participants who opt to take their pension benefits in the form of a lump sum the benefit of all interest credits through normal retirement age of 65. Rev. Rule. 2008-7, 2008-7 I.R.B. 419, 2008 WL 274325 ("[I]n determining the accrued benefit of a participant under a cash balance plan at any time prior to normal retirement age, the balance in the cash balance plan must be projected with interest credits to normal retirement age"); *accord Berger*, 338 F.3d at 762 (*quoting* IRS Notice 96-8)). That failure—not any discounting for retirement prior to age 55—is what this case has always been about.

The Seventh Circuit's reliance upon *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197 (8th Cir. 1992), is thus entirely misplaced. *Atkins* involved a traditional (*i.e.*, non-cash balance) defined benefit plan which offered pension benefits on an age-neutral basis. There is no basis at all for the Seventh Circuit's suggestion that *Atkins* somehow supports the legality of the explicitly age-discriminatory discontinuation of benefit accruals under the Monsanto Plan.

CONCLUSION

For all of the foregoing reasons, Petitioners request that the Court grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 30, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-3637

GRANT M. WALKER, individually and on behalf of all others similarly situated, et al.,

Plaintiffs-Appellants,

v.

MONSANTO COMPANY PENSION PLAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:04 C 00436—**J. Phil Gilbert**, *Judge.*

ARGUED APRIL 20, 2010—
DECIDED JULY 30, 2010

Before BAUER, FLAUM, and EVANS, *Circuit Judges.*

FLAUM, *Circuit Judge.* This is a class action lawsuit challenging the manner in which certain credits accrue in the Monsanto Company's pension plan as inconsistent with a provision of the Employee Retirement Income

Security Act ("ERISA"), 29 U.S.C. § 1054(b)(1)(H)(i), which prohibits defined benefit plans from ceasing or reducing an employee's benefit accrual because of the attainment of any age. Finding that the employees' rate of benefit accrual does not decrease because of age, we affirm the district court's grant of summary judgment to the defendants.

I. Background

This case has its origins in a 1997 restructuring of Monsanto Company's pension plan.[1] Monsanto converted its classic defined benefit plan into a "cash balance plan." In a typical defined benefit plan, participants' benefits are described as an annuity to be paid at regular retirement age. Under a cash balance plan, each participant has a hypothetical account that represents the value of his or her pension benefit as a lump sum (some, but not all, plans give participants the option of taking this lump sum at retirement rather than receiving annuity payments). The account is hypothetical because plan participants do not actually have individual accounts. Instead, all of the plan's assets are held in trust for all participants, and the employer

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1. After the pension plan was restructured, Monsanto split into three separate corporations: Pharmacia Corporation, Solutia Inc., and a newly-created Monsanto Company. The district court certified three separate classes, one for each of the corporate spin-offs. Because the plans remain identical in all relevant respects, we do not distinguish among the plans or defendants, and refer to the defendants collectively as "Monsanto."

is responsible for ensuring that the assets are sufficient to pay the promised benefits. ERISA treats cash balance plans as a type of defined benefit plan.

As part of the 1997 conversion, Monsanto established two different cash balance accounts for each of its employees. One account was intended to reflect only new benefits earned after conversion. The second was intended to preserve the age-65 benefits that employees had already earned at the time of conversion. Only the second account, called the "Prior Plan Account" or "PPA," is at issue in this case.

Prior to conversion, the Monsanto retirement plan was not wholly standardized, meaning that the retirement options of individual employees varied. First, all employees earned an age-65 retirement benefit, which was expressed as a monthly annuity beginning at age 65. For example, an employee who retired at age 55 might be entitled to receive a $1,000 monthly annuity beginning at age 65 until she died. Second, some of the prior plans provided a discounted early retirement option to employees. These employees could begin receiving annuity payments as early as age 55, although the payments would be discounted by 3% for each year that the employee's age was less than 65 to reflect the longer time of payment. Finally, some of the prior plans provided for a subsidized early retirement option. Eligible employees could begin receiving their full age-65 benefit as early as age 55, without taking a discounted monthly payment.

Appendix A

The new PPA accounts were designed to preserve each employee's age-65 accrued balances, while standardizing the early retirement options of Monsanto employees. First, the PPA extended to all employees the right to begin receiving full age-65 payments as early as age 55 (the most generous of the old early retirement options). Second, the new plan gave all employees the opportunity to begin receiving benefits even before age 55. If an employee chose this option, his or her benefit would be discounted by 8.5% per year for each year the participant was younger than age 55. It is the mechanism through which this discount was implemented that is at the center of this lawsuit.

To calculate the opening balance of each participant's PPA, Monsanto applied a conversion formula by which the account was "credited with an amount equal to the Actuarial Equivalent lump sum value of the Participant's Predecessor Plan Accrued Benefit . . . discounted using an interest rate of eight and one-half percent per annum for each month, if any, by which the Participant's age as of January 1, 1997 precedes age 55." (Plan § 6.2(b)). In other words, each employee's benefit under the old plan, which had been expressed as an annuity, would be converted to a lump sum equivalent to the cost of that annuity. That lump sum would then be discounted by 8.5% per year for each year younger than 55 the employee was at the time of conversion.

Appendix A

Once established, each individual's PPA increases by way of two monthly "credits": "pay credits" and "interest credits." Pay credits, which are intended to reward employees for the length of their service, are equal to the current PPA balance multiplied by the monthly equivalent of 4% per annum. Employees continue to receive pay credits as long as they work for Monsanto, regardless of age. Interest credits are equal to the current PPA balance multiplied by the monthly equivalent of 8.5% per annum. Interest credits cease once "the Participant attains age 55." (Plan § 6.2(d)).

In mid-1996, before the effective date of the plan conversion, Monsanto distributed literature to employees to explain the new plan. These communications explained that the 8.5% discount applied to the initial balance of employees younger than 55 and the corresponding 8.5% credits then applied until age 55. Each of these communications described the 8.5% discount as an early retirement benefit and the 8.5% interest credits as necessary to restore the full previously accrued benefit to employees.

On June 23, 2004, plaintiffs filed *Walker v. Monsanto Company Pension Plan*, No. 04-436, in the Southern District of Illinois. On September 1, 2006, the district court entered an order consolidating the *Walker* action with three related actions: *Davis v. Solutia, Inc. Employees' Pension Plan*, No. 05-736 (filed October 12, 2005); *Donaldson v. Pharmacia Pension Plan*, No. 06-3 (filed January 3, 2006); and *Hammond v. Solutia, Inc. Employees' Pension Plan*, No. 06-139 (filed February

15, 2006). The consolidated complaint alleges, among other things, that the substantively identical cash balance defined benefit plans violate ERISA's prohibition on ceasing or reducing an employee's benefit accrual because of the attainment of any age.

On May 22, 2008, the district certified three identical "Age 55 Cut-off claims." On June 11, 2009, the district court granted defendants' motion for summary judgment on the Age-55 Cut-off claims and denied plaintiffs' cross-motion for summary judgment on those same claims. After additional proceedings in which the plaintiffs prevailed on an unrelated claim (not challenged on appeal), the district court entered final judgment disposing of all claims with respect to all parties on September 29, 2009. Plaintiffs timely appealed.

II. Discussion

Plaintiffs' argument is that the plan violates ERISA on its face. First, they argue that the interest credits are part of a participant's "benefit accrual" because they are an input credited by the employer to the participant's stated account balance. Second, they argue that the express terms of the plan terminate this benefit when a participant reaches age 55.

ERISA prohibits defined benefit plans from reducing "an employee's rate of benefit accrual . . . because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i). As an initial matter, then, we must address whether interest credits, which are intended

to reverse the 8.5% per annum discount applied to employees' opening balances, constitute "benefit accrual."

ERISA does not define the phrase, "benefit accrual." However, we have considered its meaning previously. *See Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006). In *Cooper*, the defendant, IBM, ran a cash balance pension plan that operated in a manner similar to a defined contribution plan. Each employee received a 5% pay credit (based on the employee's current salary) and an interest credit (equal to 1% above the Treasury rate multiplied by the account's balance) each year. Interest credits continued to accrue until retirement age, whether or not the participant ceased working for the company. At retirement, an employee could either take the balance as cash or roll it over into an annuity. *Id.* at 637. The plaintiffs in *Cooper* alleged that this plan discriminated against older workers. Because a younger worker would receive more years of interest before retirement, a year of service at age 35 would increase an employee's total accrued benefit more than a year of service (at the same salary) at age 55. We rejected the *Cooper* plaintiffs' arguments, noting that it "treats the time value of money as age discrimination." *Id.* at 638. Instead, we held that "benefit accrual" addresses "the rate at which value is added (or imputed) to an account, rather than the annual pension at retirement age." *Id.* at 639. In reaching this decision, we relied on the fact that IBM's method of crediting retirement accounts would certainly have been permissible for a defined contribution plan.

Id. at 638; *see also* 29 U.S.C. § 1054(b)(2)(A) (requiring that, for defined contribution plans, "allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age."). Finally, we noted that a draft Treasury regulation acknowledged that for cash balance plans that operated in a manner similar to a defined contribution plan, "benefit accrual" should be treated as "the additions to the participant's hypothetical account for the plan year." *Cooper*, 457 F.3d at 639; *see also* 67 Fed. Reg. 76,123, 76,125 (Dec. 11, 2002).

Plaintiffs argue that in *Cooper*, we adopted a bright-line rule that any credit to a participant's cash balance account amounts to benefit accrual. Since the interest credits here increase the stated cash balance, they argue, they must be benefit accruals. Defendants, on the other hand, argue that the interest credits cannot be benefit accruals because they do not increase the total "accrued benefit"—the amount of the annuity to which the employee is entitled at normal retirement age. *See Cooper*, 457 F.3d at 638; 29 U.S.C. § 1002(23)(A).

The disagreement stems from the flexible nature of cash balance plans. The most common type of cash balance plan operates in a manner similar to a defined contribution plan, as did the plan at issue in *Cooper*. *See also Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 757 (7th Cir. 2003) (describing a cash balance plan that "resembles" a defined contribution plan). For these cash balance plans,

which pay participants a yearly interest rate on their plan balances, we must look to "the additions to the participant's hypothetical account for the plan year" to avoid treating compound interest as age discrimination. *See Cooper*, 457 F.3d at 639 (quoting 67 Fed. Reg. at 76,126). But plaintiffs point to no requirement that a cash balance plan operate in this way. The plan at issue in this case instead mimics a defined benefit plan (likely because it was intended to preserve the benefits already earned by employees under Monsanto's old defined benefit plan). Participants are promised a certain benefit at retirement, which is described as a lump-sum cash balance. Because this is not an "eligible cash balance plan," *see* 67 Fed. Reg. at 76,125, the general mechanism for determining benefit accrual applies—"the increase in the participant's accrued normal retirement for the benefit year." *Cooper*, 457 F.3d at 639 (quoting 67 Fed. Reg. at 76,125). The draft Treasury Regulation makes clear that this general method may be used by all defined benefit plans (including cash balance plans); it is only the method used in *Cooper* that is limited to certain qualifying cash balance plans. 67 Fed. Reg. at 76,125 (stating that the general rule "may be used by all defined benefit plans" while the "second approach may be used only by an eligible cash balance plan").

One might wonder how these two mechanisms can coexist. The reason is that while retirement plans are prohibited from discriminating against older workers, they are not prohibited from favoring them. Traditional defined benefit plans and the cash balance plans that mimic them treat younger workers less favorably than

older workers. These plans do not address the fact that an employer will have to save more to pay out a particular accrued retirement benefit for an older worker (who is close to retirement, giving the employer less compound interest on the savings) than to pay that same benefit to a younger worker (who is further from retirement, allowing the employer to earn more compound interest on the savings). *See Cooper*, 457 F.3d at 639 (noting that traditional defined benefit plans favor older workers). Imagine two workers who, for a given year, both earn an identical increase in their monthly annuity at retirement. If one worker is at retirement age, the employer will have to set aside the full value of that annuity immediately. But for a young worker, the present value of the annuity is significantly less, because setting aside a smaller amount of money to earn interest for several years will suffice to pay the benefit. Because a plan that increases the accrued benefit at retirement equally for young and old workers actually favors the older workers, treating the "rate of benefit accrual" as "the increase in the participant's accrued normal retirement benefit for the year" will never mask age discrimination where it exists.

Looking at the rate of increase in the participant's accrued normal retirement benefit, it becomes clear that the interest credits here are not benefit accruals. This is because they never increase the accrued benefit at retirement. Imagine, for example, a 50-year-old employee who accrued prior to conversion a retirement benefit worth $1,000 per month at normal retirement age. Further assume the value of this benefit as a lump

sum is $125,000. Under the new plan, the employee would be entitled to collect this benefit at age 55. This $125,000 lump sum is discounted at the rate 8.5% for the five years left before the worker reaches age 55. In 1997, at age 50, her account balance would be $83,131.[2] But if she retired at age 50 and waited to receive her benefits until age 55, she would receive five years of interest on that balance, resulting in a lump sum of $125,000.[3] At age 51, her account balance would increase by 8.5%, or $7,066, to $90,197. But if she retired at age 51 and waited until normal retirement age to collect her benefit, she would receive four more years of interest credits, again resulting in a balance of $125,000. And if she worked beyond age 55, her accrued benefit would remain at $125,000 (in the PPA account—remember that she would continue to earn new benefits, but these are tracked in a separate account). Viewed as the increase in her accrued benefit at normal retirement age, the hypothetical employee's rate of benefit accrual is zero, both before and after reaching age 55.[4] The only time the value of the account at retirement would be different

2. Assuming that interest is compounded annually, the discounted opening balance is arrived at by dividing the lump-sum accrued benefit by 1.085 (one plus the interest rate) raised to the fifth power (the number of years of discounting).

3. The value of the age 50 balance at age 55 is arrived at by multiplying the discounted opening balance by 1.085 (one plus the interest rate) raised to the fifth power (the number of years remaining until she reaches age 55 and is eligible for the full retirement benefit).

4. This hypothetical is a simplification, because it ignores the 4% annual "pay credit," which continues to accrue as long as the plan participant works for Monsanto. Plaintiffs argue

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than $125,000 is if the employee began receiving payments before age 55—in other words, if she took advantage of the discounted early retirement option provided by Monsanto. Plaintiffs' argument, if adopted, would treat all discounted early retirement programs as violations of § 1054(b)(1)(H)(i).

In this respect, plaintiffs' argument is quite similar to the argument rejected by the Eighth Circuit in *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197 (8th Cir. 1992). In *Atkins*, the defendant airline's retirement plan offered a normal retirement benefit to pilots at age

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that even if the 8.5% interest credits would not otherwise be benefit accruals, they become benefit accruals because they also apply to the 4% pay credit. This argument fails as a matter of mathematics. The 4% pay credit applies to balance of the PPA account, which for workers under age 55, has already been discounted at a rate of 8.5% per year. Applying the 4% pay credit for each new year of service to the discounted cash balance is equivalent to applying the pay credit for each new year of service to the accrued benefit and then discounting the accrued benefit to a cash balance. An example may be helpful. If we include the pay credits, at age 51 our hypothetical employee's cash balance account will have increased to $93,805: $83,131 (the initial balance) plus $3,325 (the pay credit) plus $7,349 (the interest credit on the sum of the initial balance and the pay credit). This results in an age-55 benefit of $130,000 ($93,805 times 1.085 to the fourth power). Alternately, one could apply a 4% pay credit to the age-55 balance of $125,000. This equals an accrued benefit of $130,000; discounted by the four years remaining until age 55, this yields a cash balance of $93,805 ($130,000 divided by 1.085 to the fourth power). Thus, at any time, the only increase in the value of an employees' cash balance or accrued benefit is solely attributable to the 4% pay credits, which do not cease upon reaching any age.

60 and an early retirement benefit that was discounted for pilots younger than 60. Because of the discounting, the monthly benefit of pilots who did not take early retirement would appear to increase each year that they postponed receipt of their benefits (as each passing year meant one less year of discounting for early payment); but at age 60, the increases ceased, as the pilot was then entitled to the full retirement benefit.[5] The pilots argued that when the airline ceased giving them increases to reverse the early retirement discount, it had ceased their benefit accrual on account of age and thereby violated 29 U.S.C. § 1054(b)(1)(H)(i). The Eight Circuit rejected this argument, noting that ERISA permits early retirement discounts and holding that because they do not affect the pension payment a retiree receives at normal retirement age, the reversal of early retirement discounts are not "accrued benefits" under ERISA. 967 F.2d at 1201.

Plaintiffs' attempts to distinguish *Atkins* are unavailing. They argue that unlike *Atkins*, this case involves neither a service cap nor an early retirement feature. They do not explain why the presence of a service cap makes any difference, and we see none.

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5. The perceived inequality was exacerbated in *Atkins* because the airline also had a service cap of 25 years (which is permitted under ERISA). A pilot who reached 25 years of service before age 60 would see his "benefit" increase each year until he reached 60 as the early retirement discount phased out, but a pilot who reached 25 years of service after 60 would see no increase after the 25th year (because no early retirement discount would apply to his payment).

Their claim that the plan at issue here does not include an early retirement benefit is misleading. We have already explained why the mechanism of discounting the opening cash balance of employees under age 55 and then crediting back that discount until the employee reaches age 55 functions like an early retirement discount, never changing the accrued benefit at normal retirement age but reducing the benefit if employees choose to receive payment early. Plaintiffs object to the characterization of the 8.5% interest credits as a reversal of the earlier 8.5% discounting; they dismiss it as "mathematically convenient" but unfounded because there is no cross-reference between Section 6.2(b) of the plan, which discounts the opening balance, and Section 6.2(d), which describes the interest credits. This argument is spurious. Whether or not there is a cross-reference, the concrete result of applying the two formulas is that a participant's accrued benefit never changes. Moreover, it is undisputed that this mechanism was described to employees as the way the discounted early retirement feature was being implemented. The only evidence plaintiffs cite in support of their claim that the 8.5% interest credits were not part of a discounted early retirement option is an excerpt from a 2002 submission to the IRS in which Monsanto indicated that there is no early retirement benefit formula in the plan. This statement was correct—because the early retirement discount was built into the opening balance of the PPA accounts, there is no separate early retirement formula in the plan. In any event, it is irrelevant to this appeal whether the discount and subsequent credits are described as an early retirement

discount or not. The applicable statute makes no mention of early retirement discounts but rather asks whether a participant's rate of benefit accrual ceases or is reduced on account of reaching a certain age. 29 U.S.C. § 1054(b)(1)(H)(i). Like the credits to reverse the early retirement discounts in *Atkins*, the interest credits here have no impact on the accrued benefit at normal retirement age and therefore have no effect on an employee's rate of benefit accrual.

Plaintiffs' final argument is that the Monsanto plan works an "impermissible forfeiture" by not extending the interest credits to age 65. Citing IRS Notice 96-8 and Revenue Ruling 2008-7, they argue that all cash balance plans must add any "interest" through a plan's normal retirement age. *See* Rev. Rule 2008-7, 2008-7 I.R.B. 419, 2008 WL 274325 ("[I]n determining the accrued benefit of a participant under a cash balance plan at any time prior to normal retirement age, the balance in the cash balance plan must be projected with interest credits to normal retirement age."); Notice 96-8, 1996-8 I.R.B. 23, 1996 WL 17901 ("Under a cash balance plan, the retirement benefits payable at normal retirement age are determined by reference to the hypothetical account balance as of normal retirement age, including benefits attributable to interest credits to that age.") These regulations do not help plaintiffs' cause. The notice and revenue ruling provide only that when a plan promises interest credits prior to normal retirement age that are not conditioned on future employment, then the plan must include the value of the interest credits when converting an employee's

accrued benefit to an immediately payable lump sum. *See Cooper*, 457 F.3d at 640 (Notice 96-8 requires that "a plan must . . . add all the interest that would accrue through age 65, then . . . discount the resulting sum to its present value."); *see also Fry v. Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644, 645 (7th Cir. 2009) (in calculating lump-sum distributions, pension plans were required to "start with the current balance and add any contractually promised interest (or any other form of guaranteed increase in benefits) through the employee's 'normal retirement age' " before discounting them to a present value). These regulations follow from the principle that a lump-sum substitute for an accrued pension benefit must be the "actuarial equivalent" of that benefit. *See* 29 U.S.C. § 1054(c)(3); *Berger*, 338 F.3d at 759. Thus, promised future interest credits that increase the accrued benefit must be included when calculating the lump sum paid to someone who chooses to take their benefit before regular retirement age. *Id.* at 760. We have already explained that the interest credits here, unlike those at issue in *Berger*, do not increase the accrued benefit at normal retirement age. But plaintiffs' argument also fails at a more fundamental level. They are not arguing that the plan forfeits retirement-age benefits when a participant elects to take a lump-sum payment early; rather, they seek to *increase* the retirement-age benefit by requiring interest credits through age 65.[6] But the regulations do not prescribe what benefit a plan must promise a

6. In particular, plaintiffs do not claim that the 8.5% early retirement discount rate from age 55 works an impermissible forfeiture by understating that present value of the participant's

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participant at retirement age. They only require that a participant receive the actuarial equivalent of that benefit if the participant takes a lump-sum payment early. Notice 96-8 and Revenue Ruling 2008-7 are thus wholly irrelevant to plaintiffs' claims.

III. Conclusion

We AFFIRM the district court's grant of summary judgment to the defendants.

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accrued benefit at normal retirement age. *Cf Berger*, 338 F.3d at 759 ("[Plaintiffs] contend that the amount they received was not the actuarial equivalent of what they would have received either as an annuity or a lump sum had they waited until age 65."); *see also* 29 U.S.C. § 1053(f) (no impermissible forfeiture when the present value of the accrued benefit is, under the terms of the plan, equal to the amount expressed as the balance in the cash balance account).

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JUNE 11, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 3:04-cv-436-JPG-PMF

CONSOLIDATED CLASS ACTION

Consolidated with:
Case No. 05-cv-736-JPG
Case No. 06-cv-3-JPG
Case No. 06-cv-139-JPG

GRANT M. WALKER, EDWARD ZERINGUE, and RICHARD W. DRAKE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MONSANTO COMPANY PENSION PLAN and MONSANTO COMPANY,

Defendants.

Appendix B

GLYNN DAVIS, EUGENE FORNERIS, and JUANITA HAMMOND, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

SOLUTIA INC. EMPLOYEES' PENSION PLAN,

Defendant.

FRED DONALDSON, ALBERT WALTER III, MARY CLAWSON, SANDRA BELLON, AUDREY SOKOLOSKI, and CAROL THOMAS, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

PHARMACIA CASH BALANCE PENSION PLAN, PHARMACIA CORPORATION, PHARMACIA & UPJOHN COMPANY, and PFIZER, INC.,

Defendants.

Appendix B

MEMORANDUM AND ORDER

This matter comes before the Court on the joint motion for summary judgment on Counts I, II and III filed by defendants Monsanto Company Pension Plan and Monsanto Company (collectively, "Monsanto"), Pharmacia Cash Balance Pension Plan, Pharmacia Corporation, Pharmacia & Upjohn Company and Pfizer, Inc. (collectively, "Pharmacia") and Solutia Inc. Employees' Pension Plan ("Solutia") (Doc. 284). The plaintiffs, on behalf of their respective classes, have responded to the motion (Doc. 294), and the defendants have replied to that response (Doc. 299). The Court also considers the plaintiffs' motion for summary judgment (Doc. 285) to the extent it seeks judgment on Counts I, II and III, the defendants' response to the plaintiffs' summary judgment arguments about Counts I, II and III (Doc. 293), and the plaintiffs' reply to that response (Doc. 297). The parties have submitted additional materials in connection with the pending motions (Docs. 314, 315, 316, 318 & 319), and on May 6, 2009, the Court held oral argument on the motions.

Summary judgment is appropriate where "the pleadings, the discovery and disclosed materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). There are no factual disputes before the Court in relation to Counts I, II and III; the Court is

only asked to decide legal issues to determine whether any party is entitled to judgment as a matter of law.

I. Background

This matter involves an identical provision in the pension plans of defendants Monsanto Company Pension Plan, Pharmacia Cash Balance Pension Plan and Solutia Inc. Employees' Pension Plan. Because the relevant provision is identical, the Court will refer to all of the plans collectively simply as "the Plan." Furthermore, a single corporation was the predecessor of all the defendant corporations, and the Court will refer to that entity at "Old Monsanto."

As of January 1, 1997, Old Monsanto converted its various existing traditional defined benefit pension plans to a single cash-balance defined benefit plan. In a traditional defined benefit plan, a participant is entitled to a certain benefit upon retirement such as, for example, a monthly annuity equal to a certain percentage of his highest annual earnings. A traditional defined benefit plan must provide that benefit regardless of the cost to the plan, so the employer bears the risk that the plan will not be adequately funded to pay the benefits. In a cash-balance defined benefit plan, each participant maintains a cash balance account on the books only – thus, it is often referred to as a "notional" account – to which credits can be added through the participant's working period based on his salary and "interest" on the notional account balance. Because the account is notional and contains no real

dollars, the employer still bears the risk of not having sufficient assets to cover pension obligations, but Old Monsanto believed participants could more easily understand the value of a cash-balance benefit than a future pension expressed as a monthly payment amount. In 1996, before the conversion, Old Monsanto communicated the details of the conversion to its employees in a variety of ways and included detailed descriptions of how benefits that participants had accrued under the prior defined benefit plans would be treated in the conversion, which is described in more detail in the following paragraphs.

The conversion to a cash-balance plan was complicated because many employees who worked for Old Monsanto prior to January 1, 1997, had accrued benefits under the prior plans, and when those benefits were converted to the new Plan, Old Monsanto had to do so without reducing their value. To accomplish this, Old Monsanto converted an employee's accrued benefit under a prior plan into a Prior Plan Account ("PPA").[1] It did this by determining the value at the time of conversion of the monthly annuity to which the employee would have been entitled under the prior plan at age 65 (the Plan's normal retirement age) based on the employee's then-current salary history and/or years of service, and multiplying that number by 125 to get a

1. The Plan also contained a Cash Balance Account ("CBA") for each participant where post-transition benefit accruals would be reflected. The CBA is not at issue in this litigation.

lump sum value for the employee's accrued benefit at the time of conversion (125 is the annuity conversion factor selected to approximate the average number of months an annuity would be paid). It then reduced the lump sum by 8.5% per year to its value at the age of the employee at the time of the transition to arrive at the employee's opening PPA balance, as described in § 6.2(b) of the Plan, which is further described in the following paragraph.

The magnitude of the reduction was impacted by Old Monsanto's decision to treat all participants as if they were entitled to a fully subsidized early retirement benefit at age 55 and a discounted early retirement benefit before age 55 (features of the Plan), even when they were not entitled to such benefits under their prior plans. The result was that each participant's lump sum accrued benefit under his prior plan was reduced 8.5% per year *for each year the employee was less than 55 years old*, not 65 years old. The resulting amount – the lump sum value of the employee's accrued benefit at the time of the conversion reduced by 8.5% for each year the employee was under 55 years of age – became the beginning PPA notional cash balance. Had Old Monsanto not extended the early retirement benefits to participants who had not been entitled to them under their prior plans, their lump sum accrued benefits would have been reduced *from age 65*. The Plan provided that the PPA balance would grow by 8.5% annually through "interest credits" so that by the time the participant reached age 55, the PPA balance would be equal to the

undiscounted lump sum value of the employee's accrued benefit under the prior plans at the time of conversion.[2]

The controversy in this litigation stems from § 6.2(d) of the Plan, which directs that "interest credits" be awarded to each participant's PPA at a rate of 8.5% per year until the participant reaches age 55, at which time the interest credit awards cease. The plaintiff classes claim that this provision violates the prohibition on age discrimination in § 204(b)(1)(H)(i) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1054(b)(1)(H)(i), and the Internal Revenue Code ("IRC"), 26 U.S.C. § 411(b)(1)(H)(i), and the prohibition on forfeiting benefits in § 203(a)(2) of ERISA, 29 U.S.C. § 1053(a)(2), and the IRC, 26 U.S.C. § 411(a)(2). The defendants argue that the cessation of interest credits to PPAs at age 55 is not discriminatory because the interest credits up to that time simply reversed the discount taken in the calculation of the beginning PPA cash balance to reflect the pre-55 early retirement feature of the Plan. In the defendants' view, once a participant reaches age 55, the discount will have been fully reversed by the annual 8.5% credits prior to age 55, and the PPA cash balance will be equal to the full, undiscounted lump sum value of the employee's accrued

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2. The defendants note that the IRS issued favorable rulings with respect to the tax-qualified status of the Old Monsanto and Solutia plans. Although these rulings may be entitled to some respect under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *see Hurlic v Southern Cal Gas Co.*, 539 F.3d 1024, 1034 (9th Cir. 2008), the Court does not rely on them in ruling on the pending motions.

benefit under the prior plan as calculated at the time of the conversion. They further argue that the claims of the plaintiff classes are time-barred.

II. Analysis

The critical statutory provision is § 204(b)(1)(H)(i) of ERISA, 29 U.S.C. § 1054(b)(1)(H)(i), which forbids age discrimination in benefit accrual by disqualifying from tax benefits any plan where "an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age."[3] The plaintiff classes claim that § 6.2(d) of the Plan[4] violates this provision because, by its plain terms, it stops the awarding of "interest credits" on the PPA balance

3. The IRC contains a provision identical to the cited ERISA provision. *See* 26 U.S.C. § 411(b)(1)(H)(i). For simplicity's sake, the Court will only refer to the ERISA provision in this order, although its ruling applies equally to the alleged IRC violations.

4. Section 6.2(d) states:

> *Interest Credits.* For each month prior to the earlier of the first day of the month following the month in which the Participant attains age 55 or his Annuity Starting Date, a Participant's Prior Plan Account shall be credited with Interest Credits equal to the sum of (i) the Prior Plan Account on the first day of such month, and (ii) the Participant's Pay Credits credited for that month, if any, multiplied by 1.006822.

This calculation yields an annual interest of approximately 8.5%.

when a participant turns 55 years old. They argue that the Plan must stand or fall on its face because it is unambiguous, and consideration of extrinsic evidence to interpret an unambiguous contract provision should not be allowed. On the other side, the defendants argue that the history and context of the PPA "interest credits" must be considered in order to understand their role in the Plan, that is, that they are not truly "interest" but the restoration of a discount taken at the time of the conversion.

A. Consideration of Extrinsic Evidence

The Court will consider extrinsic evidence to interpret § 6.2(d) of the Plan and to determine its place in the context of the entire Plan. Plan interpretation is governed by federal common law rules of contract interpretation. *Neuma, Inc. v. AMP, Inc.*, 259 F.3d 864, 873 (7th Cir. 2001). Where a plan is unambiguous, that is, if it is susceptible to only one reasonable interpretation, it must be interpreted accordingly. However, where a plan is susceptible to more than one reasonable interpretation, the Court may consult extrinsic evidence in accordance with the plain language of the plan.

The plaintiff classes are correct that § 6.2(d) is unambiguous on its face when read in a vacuum. Its language viewed in an "ordinary and popular sense as would a person of average intelligence and experience," *Neuma*, 259 F.3d at 873, is clear: the Plan stops awarding interest credit when a participant turns 55. True interest

credits for a cash-balance account are an accrued benefit to which a participant is entitled when he reaches normal retirement age and which therefore must be included when calculating a lump sum retirement benefit. *See Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 761 (7th Cir. 2003). Thus, under § 6.2(d)'s plain terms, the participant's accrual of interest credits ceases because the participant attains the age of 55, and § 6.2(d) violates ERISA's anti-discrimination provisions unless there is an ambiguity in the Plan.

The defendants argue that such an ambiguity is revealed when one considers the calculations used to arrive at the beginning PPA balance as described in § 6.2(b) of the plan,[5] the pre-conversion explanatory materials distributed to participants and the Plan's summary plan description ("SPD"). Considering such evidence, they argue, it becomes clear that the 8.5% "interest credits" are not truly interest at all but are instead a reversal of the discount taken during the conversion as described in § 6.2(b). Under their view, the Plan is not discriminatory because it ceases "interest credits" when a participant turns 55.

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5. Section 6.2(b) states, in pertinent part:

> The Prior Plan Account of a Participant . . . shall, as of January 1, 1997, be credited with an amount equal to the Actuarial Equivalent lump sum value of the Participant's Predecessor Plan Accrued Benefit . . . , discounted using an interest rate of eight and one-half percent per annum for each month, if any, by which the Participant's age as of January 1, 1997 precedes age 55. . . .

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The doctrine of extrinsic ambiguity allows parties "to present extrinsic evidence to demonstrate that although the contract looks clear, anyone who understood the context of its creation would understand that it doesn't mean what it seems to mean." *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998). "The party claiming that a contract is ambiguous must first convince the judge that this is the case . . ., and must produce objective facts, not subjective and self-serving testimony, to show that a contract which looks clear on its face is actually ambiguous." *Murphy*, 61 F.3d at 565 (citations omitted); *accord Mathews*, 144 F.3d at 467. Where a plan is ambiguous, extrinsic evidence may be considered to determine the parties' intent. *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 279 (7th Cir. 1994).

Here, anyone who understood the context and history of the 8.5% "interest credit" would understand that it is not interest as the common person understands interest. Instead, the "interest credit" represents the reversal of the discount taken from the total lump sum value of a participant's accrued benefit at the time of the plan conversion. That Old Monsanto chose to call the incremental restoration of the discount "interest credits" instead of "reverse discount credits" or "subsidy credits" or some similar term is unfortunate in that it opened the door for confusion and, as this case bears out, for litigation. Nevertheless, consideration of other portions of the Plan and of objective extrinsic evidence such as the pre-conversion materials distributed to participants and the SPD is allowed to interpret the plan.

B. Are "Interest Credits" Benefit Accruals?

The defendants argue that the cessation of "interest credits" at age 55 is not forbidden by ERISA § 204(b)(1)(H)(i)'s prohibition of cessation of "benefit accrual" because "interest credits" under the Plan are not "benefit accruals."

As both sides emphasized at oral argument, a "benefit accrual" is "what the employer puts in (either in absolute terms or as a rate of change)" to increase the value of a participant's retirement benefit. *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 639 (7th Cir. 2006), *cert. denied*, 549 U.S. 1175 (2007); *Hurlic v. Southern Cal. Gas Co.*, 539 F.3d 1024, 1037 (9th Cir. 2008) ("The term "accrue" means "to increase." . . . "Benefit accrual" thus refers to the process by which benefits increase."). In the case of a cash-balance plan, the benefit accrual is the rate at which the employer imputes value to a participant's cash-balance account. *Cooper*, 457 F.3d at 639. This is to be distinguished from an "accrued benefit," which ERISA defines as an amount "expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A); *see Cooper*, 457 F.3d at 638.

The PPA "interest credits" are not "benefit accruals" because, although the employer imputes them to a participant's cash-balance PPA, the "interest credits" do not increase the value of the participant's age-65 retirement benefit that accrued prior to the conversion. The value of a participant's accrued benefit

prior to conversion was and will always be the value of the monthly annuity to which a participant would have been entitled at age 65 had he stopped working at the time of the conversion expressed as a lump sum benefit. If the participant was 55 at the time of conversion, the lump sum benefit was not discounted at all in the beginning PPA balance, and the participant was entitled to the full value of his age-65 retirement benefit by virtue of the fully subsidized age-55 early retirement provision. If the participant was under 55 at the time of conversion, the beginning PPA balance was the accrued lump sum benefit discounted by 8.5% for each year the participant was under 55 to reflect a reduction in the early retirement subsidy (pre-55 retirement was only *partially* subsidized). The early retirement subsidy was then added back at a rate of 8.5% through "interest credits" until the PPA reached the value of the pre-1997 age-65 accrued benefit expressed as a lump sum benefit at the time of conversion – that is, 100% of the participant's accrued benefit at the time of the conversion. The Plan simply reverses the pre-55 subsidy discount year by year as the participant approaches 55, the age at which he can receive a fully subsidized retirement benefit. The benefit accrued prior to conversion never changed; only the amount of the early retirement subsidy did.

The example cited in the defendants' brief and at oral argument is helpful to understand why "interest credits" under § 6.2(d) do not increase the value of a participant's pre-conversion accrued benefit (Doc. 286, Defs.' Mem. Supp. Summ. J. 23-24). In the example,

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Mary Doe was 50 years old at the time of conversion on January 1, 1997, and her accrued benefit under her prior plan was a monthly annuity payment beginning at age 65 of $1,000 based on her salary and years of service at the time of conversion. Mary's monthly annuity of $1,000 was multiplied by 125, the annuity conversion factor, to get the lump sum value of her accrued benefit at the time of conversion: $125,000. Because the Plan offered a fully subsidized early retirement benefit beginning at age 55, Mary would have been entitled to the entire lump sum benefit of $125,000 if she retired at age 55. However, had she retired at age 54, a year prior to her being entitled to a fully subsidized retirement benefit, she would have been entitled only to a discounted retirement benefit, and her lump sum benefit would have been reduced by 8.5%. Had she retired at 53, the reduction would have been a further 8.5%, and so on.

In the Plan, the 8.5% "interest credits" describe the calculation from another perspective. Instead of describing Mary's accrued age-65 benefit as $125,000 and providing that Mary would be entitled to 8.5% less per year if she chose to retire before 55, the Plan starts Mary off at the lowest possible lump sum to which she could be entitled under the discounted early retirement program – the lump sum to which she would have been entitled under the Plan had she retired at the time of conversion, that is, at age 50. It then restored the 8.5% subsidy until she reached a PPA balance of $125,000, the lump sum value of her accrued benefit at the time of conversion, when she reached age 55. At all times

from age 50 to 55, Mary's accrued benefit was $125,000; it was only the portion of that accrued benefit to which she was entitled that changed each year because she was able to take advantage of the increasingly larger retirement subsidy.

The Plan's 8.5% "interest credit" award until age 55 is indistinguishable from the pension payment increases at issue in *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197 (8th Cir. 1992). In *Atkins*, a plaintiff class challenged their employer Northwest Airlines' pension plan that stopped awarding service credits, which were used along with the participant's earnings to calculate his accrued benefits, after a participant has accumulated 25 years of service and that reduced his pension amount if he retired before age 60, the plan's normal retirement age, to account for a projected longer payment period. *Id.* at 1200. The result was that a 55-year-old with 25 years of service credit received a lower monthly pension payment than a 60-year-old with the same years of service and the same earnings, but that the 60-year-old's pension would not increase if he continued to work beyond age 60. *Id.* The plaintiff class argued that the failure of the incremental pension payment increases before age 60 to continue after age 60 violated the same anti-age discrimination provision at issue in this suit, ERISA § 205(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i), as well as other age discrimination laws. *Id.* at 1199. They asked the Court to require the Northwest plan to invert the early retirement discount so that it became a "late retirement bonus" if a participant continued to work beyond age 60 at the same rate that the early retirement

discount was reversed before a participant turned 60. *Id.* at 1200.

The Eighth Circuit Court of Appeals held that since ERISA did not forbid service caps or early retirement discounts, it did not require Northwest's plan to award a "late retirement bonus" to employees who worked beyond 60 even if their total benefit was actuarially less than an employee who retired at age 60. *Id.* It concluded that the cessation of the monthly pension increases beyond age 60 simply reflected the exhaustion of an early retirement benefit, not improper age discrimination. *Id.* at 1201. It further noted that similarly situated participants (i.e., those with 25 years of service and the same earnings) had the same accrued benefit – the amount of pension payment to which they would be entitled *at normal retirement age* – no matter when they actually retired. *Id.* Therefore, the discontinuation of the early retirement discount reversal at age 60 had no effect on a participant's accrued benefit and was not discriminatory under ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i). *Id.* Because the reversing of the early retirement discount and the cessation of that reversal once the discount was fully reversed did not increase a participant's accrued benefit, it did not constitute a "benefit accrual" under *Cooper*.

The plaintiffs attempt to distinguish *Atkins* by noting that the *Atkins* early retirement discount reversal continued until the normal retirement age of 60, not an earlier retirement age as in the case at bar. This is immaterial. In both *Atkins* and the case at bar,

the discount was reversed until the participant was eligible for a full retirement benefit, at which point the discount reversal ceased. In *Atkins*, which provided for no fully-subsidized early retirement benefit, that occurred at the normal retirement age of 60; in this case, where there is a fully-subsidized early retirement benefit, that occurs at age 55, when a participant is eligible for that benefit.

The plaintiff classes also point to *Hurlic v. Southern California Gas Company*, 539 F.3d 1024 (9th Cir. 2008), in support of their position that the "interest credits" awarded are benefit accruals because they increase the value of the participants' retirement accounts. In *Hurlic*, as in this case, a pension plan was converted from a traditional defined benefit plan to a cash balance plan. *Id.* at 1027. At the conversion, the initial balance of each participant's retirement account was set at the actuarial equivalent of the participant's accrued benefit under the prior plan, and interest credits were added to that balance at a predetermined rate subsequent to the plan conversion. *Id.* The *Hurlic* court had occasion to consider the difference in benefit accruals in traditional defined benefit plans as compared to cash balance plans, noting that in a traditional defined benefit plan, benefits accrued – or increased – according to a formula based on salary history and years of service and that in a cash balance plan, benefits accrued – or increased – with the award of earnings and interest credits. *Id.* at 1037.

Hurlic is readily distinguishable from the case at bar because the credits at issue in each case are of an entirely different nature, although they are both labeled "interest credits." In *Hurlic*, no early discounted early retirement benefit was involved, and the interest credits represented additions to the accrued benefit of each participant. After each interest credit was awarded, a participant's accrued benefit was larger. However, as explained earlier in this order, the "interest credits" in this case did not increase the accrued benefit in any participant's PPA. Were the "interest credits" awarded under the Plan in this case truly interest instead of the reversal of an early retirement discount, the plaintiffs' position would have some merit. However, the "interest credits" in this case are indistinguishable from those in *Atkins* and of a completely different nature than those in *Hurlic*.

The plaintiff classes in this case essentially ask the Court to impose a "late retirement bonus" of 8.5% per year for participants who work beyond 55, the age at which they could first take a fully subsidized early retirement. However, as demonstrated in *Atkins*, the reversal of an early retirement discount that ceases when the discount is fully reversed at a certain age is not age discrimination and does not violate ERISA § 204 (b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i).

C. Do "Interest Credits" Cease Because of a Participant's Age?

Using the same reasoning, the defendants argue that, although the plain terms of the Plan state that "interest credits" cease at age 55, the "interest credits" cease not because of age but because the early retirement discount has been fully restored, which happens to coincide with the participant reaching age 55. Thus, the attainment of age 55 is not the *reason* the "interest credits" cease; it simply *perfectly correlates* with the reason the "interest credits" cease.

While it is unlawful to discriminate on the basis of age, it is not necessarily unlawful to discriminate on the basis of other characteristics that correlate with age. *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) (years of interest available until retirement) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12 (1993) (pension status/years of service)), *cert. denied*, 549 U.S. 1175 (2007). When a plaintiff claims age discrimination under ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i), he must "demonstrate that the complained-of effect is *actually* on account of age," not some other factor that correlates with age. *Cooper*, 457 F.3d at 642; *see Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008) (ADEA context). It is only where the correlated factor serves as a "proxy for age" that the effect will be deemed unlawfully discriminatory. *Kentucky Ret. Sys.*, 128 S. Ct. at 2367 (citing *Hazen Paper*, 507 U.S. at 613). Generally, age and pension status are analytically distinct concepts, although pension

status often turns on a pension plan participant's age. *Kentucky Ret. Sys.*, 128 S. Ct. at 2367.

Kentucky Retirement Systems v. EEOC, 128 S. Ct. 2361 (2008), provides a perfect example of the analytical distinction between age and retirement status. That case arose because Kentucky's retirement system imputed unearned years of service credits to certain workers who became disabled and who were not eligible for retirement but did not impute such credits to otherwise similarly situated workers who were already eligible for retirement. *Id.* at 2365. Years of service was a component of the pension benefit calculation, so the plan was effectively more generous to those who were not yet eligible for retirement than it was to those who were. *Id.* The EEOC argued that the plan discriminated on the basis of age because a worker like the plaintiff with at least five years of service who became disabled after age 55 received no imputed years of service but a similarly situated worker under 55 would have. *Id.* The Supreme Court concluded that the decision to impute additional years of service was non-discriminatory because it was made based on pension status, not age, although the result was that a worker under 55 received imputed years and worker 55 or older did not. *Id.* at 2369.

Here, as explained in the previous section of this order, there is no evidence showing the cessation of PPA "interest credits" at age 55 was age discrimination and that pension status was a proxy for age. Nothing in the record indicates the early retirement discount reversal

designed to provide a fully subsidized early retirement benefit at age 55 was "based on a 'prohibited stereotype' of older workers, . . . produce[d] any 'attendant stigma' to those workers, [or was] 'the result of an inaccurate and denigrating generalization about age,'" the evils age discrimination statutes were designed to remedy. *Kentucky Ret. Sys.*, 128 S. Ct. at 2366-67. On the contrary, it is clear that the Plan's decision to stop awarding "interest credits" was "actually motivated" by the fact that the early retirement discount became fully reversed at the fully subsidized early retirement age, that is, the participant's pension status. That this happens to occur without fail when a participant turns 55 (the date a participant can obtain a fully subsidized early retirement benefit) and that the Plan chose to describe the reversal point in terms of a participant's age instead of the attainment of a full early retirement subsidy does not make the cessation "because of the attainment of any age."

Atkins v. Northwest Airlines, Inc., 967 F.2d 1197 (8th Cir. 1992), discussed in the prior section of this order, is completely consistent with this conclusion. In that case, the early retirement discount expired at normal retirement age – a pension status which happened to occur invariably at age 60 – and was discontinued. *Id.* at 1200. The Court of Appeals found the cessation of the reduction to be proper because it did not "result from age discrimination," but instead "merely reflect[ed] that the early retirement discount [was] exhausted." *Id.* at 1201.

In the case at bar, the relevant pension status occurs at age 55 when a participant is eligible for a fully subsidized early retirement. Under *Kentucky Retirement Systems* and consistent with *Atkins*, the cessation of a discount reversal at the achievement of that pension status does not violate ERISA § 204 (b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i), because it is not "because of the attainment of any age."

In light of the foregoing, it is unnecessary to address the parties' other arguments regarding whether the Plan complies with § 204(b)(1)(H)(i) of ERISA, 29 U.S.C. § 1054(b)(1)(H)(i), and whether these consolidated actions were filed within the applicable statute of limitations.

III. Conclusion

For the foregoing reasons, the Court **GRANTS** the defendants' motion for summary judgment on Counts I, II and III (Doc. 284), **DENIES in part** the plaintiff's motion for summary judgment (Doc. 285) to the extent it seeks judgment on Counts I, II and III and **DIRECTS** the Clerk of Court to enter judgment accordingly at the close of the case.

IT IS SO ORDERED.
DATED: June 11, 2009

s/ J. Phil Gilbert
J. PHIL GILBERT
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED SEPTEMBER 29, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 3:04-cv-436-JPG-PMF

CONSOLIDATED CLASS ACTION

Consolidated with:
Case No. 05-cv-736-JPG
Case No. 06-cv-3-JPG
Case No. 06-cv-139-JPG

GRANT M. WALKER, EDWARD ZERINGUE, and RICHARD W. DRAKE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MONSANTO COMPANY PENSION PLAN and MONSANTO COMPANY,

Defendants.

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GLYNN DAVIS, EUGENE FORNERIS, and JUANITA HAMMOND, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

SOLUTIA INC. EMPLOYEES' PENSION PLAN,

Defendant.

FRED DONALDSON, ALBERT WALTER III, MARY CLAWSON, SANDRA BELLON, AUDREY SOKOLOSKI, and CAROL THOMAS, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

PHARMACIA CASH BALANCE PENSION PLAN, PHARMACIA CORPORATION, PHARMACIA & UPJOHN COMPANY, and PFIZER, INC.,

Defendants.

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JUDGMENT

This matter having come before the Court, the issues having been heard, and the Court having rendered a decision as to some matters and the parties having stipulated to others,

IT IS HEREBY ORDERED AND ADJUDGED that judgment on Counts I, II and III is entered in favor of defendants Monsanto Company Pension Plan and Monsanto Company and against plaintiffs Grant M. Walker, Edward Zeringue and Richard W. Drake, individually and on behalf of the Monsanto Defendants' Age 55 Cut-Off Class, defined as:

> All current vested Monsanto Plan participants (and their beneficiaries) with Prior Plan Accounts, all former vested Monsanto Plan participants (and their beneficiaries) with Prior Plan Accounts who terminated employment with New Monsanto on or after September 1, 2000, and all former employees of DEKALB Genetic Corporation who participated at any time in the Monsanto Plan.
>
> *Excluded* from the Monsanto Defendants' Age 55 Cut-Off Class are participants who terminated employment with New Monsanto prior to age 55 and who took their pension benefits in some form of annuity. Also *excluded* from the Monsanto Defendants' Age 55 Cut-

> Off Class are the Defendants, members and staff of the Employee Benefits Plans Committee, any entity in which Defendants have a controlling interest or which has a controlling interest of Defendants; Defendants' legal representatives (including employees of New Monsanto's Law Department), assigns, and successors, and any judges assigned to this case and any member of such judge's immediate family;

IT IS FURTHER ORDERED AND ADJUDGED THAT judgment on Counts I, II and III is entered in favor of defendant Solutia Inc. Employees' Pension Plan and against plaintiffs Glynn Davis, Eugene Forneris, and Juanita Hammond, individually and on behalf of the Solutia Plan's Age 55 Cut-Off Class, defined as:

> All current and former vested Solutia Plan participants (and their beneficiaries) with Prior Plan Accounts on or after January 1, 1997.
>
> *Excluded* from the Solutia Plan's Age 55 Cut-Off Class are participants who terminated employment with Solutia Inc. prior to age 55 and who took their pension benefits in some form of annuity. Also *excluded* from the Solutia Plan's Age 55 Cut-Off Class are the Defendant, members and staff of the Employee Benefits Plans Committee, any entity in which Defendant has a controlling

> interest or which has a controlling interest of Defendant; Defendant's legal representatives (including employees of Solutia Inc.'s Law Department), assigns, and successors, and any judges assigned to this case and any member of such judge's immediate family;

IT IS FURTHER ORDERED AND ADJUDGED THAT judgment on Counts I, II and III is entered in favor of defendants Pharmacia Cash Balance Pension Plan, Pharmacia Corporation, Pharmacia & Upjohn Company and Pfizer, Inc. and against plaintiffs Fred Donaldson, Albert Walter III, Mary Clawson, Sandra Bellon, Audrey Sokoloski, and Carol Thomas, individually and on behalf of the Pharmacia Defendants' Age 55 Cut-Off Class, defined as:

> All current and former vested Pharmacia Plan participants (and their beneficiaries) with Prior Plan Accounts, and all former vested Monsanto Plan participants (and their beneficiaries) with Prior Plan Accounts who terminated employment with old Monsanto Company or Pharmacia Corporation on or after January 1, 1997 and on or before December 31, 2001, other than former employees of DEKALB Genetic Corporation and other than persons who are members of the Solutia Plan's Age 55 Cut-Off Class.
>
> *Excluded* from the Pharmacia Defendants' Age 55 Cut-Off Class are participants who

> terminated employment with Pharmacia Corporation prior to age 55 and who took their pension benefits in some form of annuity. Also *excluded* from the Pharmacia Defendants' Age 55 Cut-Off Class are the Defendants, members and staff of the Employee Benefits Plans Committee, any entity in which Defendants have a controlling interest or which has a controlling interest of Defendants; Defendants' legal representatives (including employees of the Law Departments of Pharmacia Corporation, Pharmacia & Upjohn Company, and Pfizer Inc.), assigns, and successors, and any judges assigned to this case and any member of such judge's immediate family;

IT IS FURTHER ORDERED AND ADJUDGED that Counts IV, V and VI are dismissed without prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that Counts VII, VIII and IX are dismissed with prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that in settlement of Count X defendants Monsanto Company Pension Plan and Monsanto Company shall pay $590,428.04 in compensation to the Monsanto Defendants' Late Lump Sum Class, defined as:

> All former Monsanto Company Pension Plan participants (and their beneficiaries) with

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Prior Plan Accounts who terminated employment with New Monsanto on or after September 1, 2000, and who took a lump sum distribution at least one complete calendar month after their Benefit Commencement Date; all current Monsanto Company Pension Plan participants (and their beneficiaries) with Prior Plan Accounts who have not yet taken a distribution of their pension benefits.

Excluded from the Monsanto Defendants' Late Lump Sum Class are the Defendants, members and staff of the Employee Benefits Plans Committee, any entity in which Defendants have a controlling interest or which has a controlling interest of Defendants; Defendants' legal representatives (including employees of Monsanto's Law Department), assigns, and successors, and any judges assigned to this case and any member of such judge's immediate family; that defendants Monsanto Company Pension Plan and Monsanto Company shall pay $209,571.96 in attorney's fees to Monsanto Defendants' Late Lump Sum Class counsel; and that Count X is dismissed with prejudice, the parties to pay their own costs except as provided herein.

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DATED: September 29, 2009

JUSTINE FLANAGAN, Acting Clerk

s/Donna Stull
Deputy Clerk

Approved: s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED SEPTEMBER 14, 2010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-3637

GRANT M. WALKER, individually and on behalf of all other similarly situated, et al.,

Plaintiffs-Appellants,

v.

MONSANTO COMPANY PENSION PLAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. 3:04-cv-00436

September 14, 2010

Before WILLIAM J. BAUER, *Circuit Judge,* JOEL M. FLAUM, *Circuit Judge,* TERENCE T. EVANS, *Circuit Judge*

Appendix D

J. Phil Gilbert, *Judge*.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by the appellants in the above case on August 13, 2010, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. The petition is therefore **DENIED**.

No. 10-792

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 14 2011
OFFICE OF THE CLERK

GRANT M. WALKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,
Petitioners,

v.

MONSANTO COMPANY PENSION PLAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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February 14, 2010

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[See Inside Cover for Continuation of Caption]

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GLYNN DAVIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,

Petitioners,

v.

SOLUTIA INCORPORATED EMPLOYEES PENSION PLAN, *et al.*,

Respondents.

FRED DONALDSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,

Petitioners,

v.

PHARMACIA CASH BALANCE PENSION PLAN, *et al.*,

Respondents.

QUESTION PRESENTED

Whether credits to an ERISA plan's hypothetical account that add no new value to a participant's "accrued benefit," but merely restore an early retirement discount, are "benefit accruals" within the meaning of ERISA § 204(b)(1)H)(i)?

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

Pharmacia & Upjohn LLC and Pharmacia Corporation are parent corporations of respondent Pharmacia & Upjohn Company LLC. Pfizer Inc. is a parent corporation of respondent Pharmacia Corporation. Pfizer Inc. owns more than 10% of the publicly held stock of respondents Pharmacia & Upjohn Company LLC and Pharmacia Corporation.

Respondent Monsanto Company has no parent corporation and no other publicly held corporation owns 10% or more of its stock.

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STATUTES

29 U.S.C. § 1002(23)(A) 3
§ 1054(b)(1)(H)(i) 6

BRIEF IN OPPOSITION

When the Monsanto Company converted its prior pension plan to a cash balance plan, it provided certain enhancements to participants' retirement benefits. Under the previous plan, most participants could not receive benefits until age 65, and no one could receive them before age 55. Under the redesigned plan, participants were given the option to receive their benefits at any age. Full benefits were made available to everyone at age 55. Participants could also choose to take their benefits before age 55, in which case the benefits were discounted by 8.5% per year for each year the participant was younger than 55 to reflect an earlier payout. At the time of the conversion, participants were told that they would have this new discounted early retirement option in the revamped plan. Participants younger than age 55 were told that their hypothetical account balance for benefits earned under the prior plan would reflect the discount, and that the 8.5% per year discount would be restored with a corresponding 8.5% credit each year they chose not to take a distribution of their benefits, until they reached age 55, when their full benefit was payable and the discount eliminated.

Petitioners sued, claiming that this arrangement violates ERISA's prohibition against age discrimination because the 8.5% credits stop at age 55. The Seventh Circuit rejected that argument, concluding that ERISA's prohibition against age discrimination is not implicated by a credit to a cash balance account that only restores a discount related to a discounted early retirement option. Contrary to petitioners' suggestion, that ruling does not conflict with *Cooper* v. *IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006), *Register* v. *PNC Financial Services Group*,

Inc., 477 F.3d 56 (3d Cir. 2007), *Drutis* v. *Rand McNally & Co.*, 499 F.3d 608 (6th Cir. 2007), or *Hurlic* v. *Southern California Gas Co.*, 539 F.3d 1024 (9th Cir. 2008). In none of those cases did the courts discuss credits that operate only in connection with an early retirement option, or hold that ceasing any such credit at the point when the discount has been fully restored and full benefits are available—here, age 55—violates ERISA.

This Court should deny review because there is no split of authority and because petitioners present no claim of general significance. Their claims are based on a unique set of facts concerning how Monsanto preserved and enhanced the accrued benefits under the prior plan in converting to a cash balance plan design. The Seventh Circuit rightly rejected their claims, and nothing in the court's decision merits this Court's review.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Effective January 1, 1997, the Monsanto Company ("Old Monsanto") restructured its existing pension program, converting it to a single plan with a cash balance plan design. As a result of corporate restructuring, Old Monsanto's plan later became the three plans at issue in this case: the Monsanto Company Pension Plan, the Pharmacia Cash Balance Pension Plan, and the Solutia Inc. Employees' Pension Plan. The relevant provisions of each plan are identical.

Like other defined benefit plans, cash balance plans specify a promised benefit. But they do so in the form of a hypothetical "account" that reflects the benefit promised to each employee. This easily understood

account balance shows the benefit currently available to the participant. However, cash balance plans create no actual separate account for individual employees, the way 401(k) plans do. Instead, all plan "assets are held in trust for all participants, and the employer is responsible for ensuring that the assets are sufficient to pay the promised benefits." Pet. App. 2a-3a.

Old Monsanto's cash balance plan created two hypothetical accounts for each participant: a Cash Balance Account for new benefits that participants would earn going forward, and a Prior Plan Account for participants' already-earned benefits. "Petitioners are not challenging any aspect of the Plan's Cash Balance Account." Pet. 6.

The Prior Plan Account preserved the accrued benefits that participants had already earned as of the date of conversion, but did so in a present value, lump sum account format that made them easier to grasp. The accrued benefit is defined under ERISA as the "annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). Accordingly, in the prior plans, benefits were expressed to participants as a monthly annuity that a participant would receive when the participant reached age 65, the normal retirement age. The Prior Plan Account in the new plan preserved this accrued benefit, but expressed it as a lump sum amount that participants could take all at once. Because new benefits earned in the Cash Balance Account would also be presented as a current lump sum, converting the Prior Plan Account benefits to the lump-sum format made it easier for participants to calculate and understand the total benefits they had earned, and that were available to them at any given point in time.

Under the prior plans, some participants could qualify for full, undiscounted benefits before age 65, but no participant could receive any benefits before age 55. Under the new plan, all participants were credited with their full age-65 accrued benefit at age 55. All participants also were given the right to take a distribution of their benefits even before 55, but in that case the amount of their benefits would be discounted to reflect the earlier payment. The new option to take benefits before age 55 functioned like a discounted early retirement benefit. A participant electing to receive benefits under this early retirement option would have his benefit discounted by 8.5% for each year the participant was younger than age 55, and the Prior Plan Account balance would reflect that discounted amount.

Old Monsanto calculated the initial balance of the Prior Plan Account first by converting the already-earned monthly annuity (collectible at age 65 under the old plan) into a lump sum. That lump sum was then treated as fully payable to the participant at age 55. For participants age 55 or older, the full lump sum amount was the initial balance depicted in the Prior Plan Account on the date of conversion because that amount was immediately available to them as of the date of conversion. For participants younger than 55, that lump sum balance was shown to them discounted at a rate of 8.5% per year for each year the employee was younger than 55. The resulting balance reflected the amount of already-earned benefits immediately available to them as of the date of conversion under the new discounted early retirement option. If a participant did not take benefits before age 55, no discount was ever actually applied. Petitioners have never challenged the

lawfulness of the calculation of the initial balances credited to each participant's Prior Plan Account.

After the conversion, the Prior Plan Account balances for participants under age 55 at conversion increased each year by 8.5% credits until age 55, by which time the early retirement discount was reversed and their full accrued benefit was restored. For those who were 55 years old on the date of conversion, no 8.5% credits were added to their Prior Plan Accounts at any time because the early retirement discount had never applied.

The 8.5% discount and corresponding credits were explained to participants in detail before the conversion date. Various communications to participants specifically described that the 8.5% discount applied to the initial Prior Plan Account balances of employees younger than 55, and that the corresponding 8.5% credits would be applied only until participants reached age 55 because, by age 55, the discounts would be fully restored. The communications "described the 8.5% discount as an early retirement benefit and the 8.5% interest credits as necessary to restore the full previously accrued benefit to" participants. Pet. App. 5a.

Going forward from the conversion date, all Prior Plan Accounts of those who continued working increased by an annual 4% "pay credit." These 4% pay credits continued without regard to age so long as the participant remained with the company.

B. Petitioners' Claims

More than seven years after the conversion to the new plan, petitioners filed their claims against the successsors to the Old Monsanto plan. As relevant here, petitioners claimed that the plan's discontinuation of the 8.5% credits at age 55 violates

ERISA, which prohibits defined benefit plans from reducing "the rate of an employee's benefit accrual ... because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i).

C. The Lower Court Rulings

After certifying three identical classes (one for each plan successor), the district court entered summary judgment for the respondents. The court considered the "context and history" surrounding the 8.5% credits in the plans, including "other portions of the Plan and ... pre-conversion materials distributed to participants and the SPD [Summary Plan Description]." Pet. App. 28a. In light of the clear function of the 8.5% credits, the court ruled that the credits are not "benefit accruals" and do not cease "because of the attainment of any age," as petitioners claimed. *Id.* at 29a-39a.

The court of appeals affirmed. Noting that "ERISA does not define the phrase, 'benefit accrual,'" the Seventh Circuit first looked to its own previous treatment of the phrase in *Cooper* v. *IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006). Pet. App. 7a. The Seventh Circuit rejected petitioners' argument that *Cooper* "adopted a bright-line rule that any credit to a participant's cash balance account amounts to benefit accrual." Pet. App. 8a. Instead, the Seventh Circuit concluded that if credits add to the amount in a participant's hypothetical account without affecting the amount of a participant's "accrued benefit at retirement," then such "additions" are not "benefit accruals." *Id.* at 10a.

The Seventh Circuit recognized that the 8.5% credits at issue here are additions to a participant's Prior Plan Account that do not increase the accrued benefit at retirement. The court of appeals, employing

an example of a hypothetical employee who was 50 years old at the time the prior plan was converted to the cash balance plan, explained how the 8.5% credits added to the employee's Prior Plan Account until age 55 have no effect on the amount of the employee's accrued benefit. The accrued benefit the employee had earned on the date of conversion and was entitled to at age 55 (in the example, $125,000 at age 55) stays the same year after year, despite the 8.5% credit being added to the employee's Prior Plan Account each year until age 55. Pet. App. 10a-11a."Viewed as the increase in her accrued benefit at normal retirement age, the hypothetical employee's rate of benefit accrual is zero, both before and after reaching age 55." *Id.* at 11a. Ceasing the 8.5% credits at age 55, then, does not violate ERISA.

The court of appeals further explained that the 8.5% credits do not add to a participant's accrued benefit because they merely "credit[] back th[e] discount" applied at conversion. Pet. App. 14a. Petitioners had claimed that the 8.5% credits did not merely restore the 8.5% discount, but the mathematics are clear, and the court of appeals thus rejected that argument as "spurious." *Id.* at 14a. To rule as petitioners had urged "would treat all discounted early retirement programs as violations" of ERISA. *Id.* at 12a. The Eighth Circuit had previously rejected an age discrimination claim brought under ERISA against a plan with an early retirement discount feature, and the Seventh Circuit found no distinction between that case and this one. *Id.* at 12a-13a (discussing *Atkins* v. *Nw. Airlines, Inc.*, 967 F.2d 1197 (8th Cir. 1992)).

Finally, the Seventh Circuit observed that the 4% pay credits have no effect on the analysis. The 4% pay credits increase the "value of an employee's ...

accrued benefit," but those 4% credits "do not cease upon reaching any age." Pet. App. 12a n.4. And "as a matter of mathematics," the operation of the 8.5% credits is not affected by the presence of the 4% pay credits. *Id.* While the 4% pay credits add to the amount of a participant's accrued benefit, they have no mathematical impact on the 8.5% restorative credits and do not alter the function of the 8.5% credits. With or without the 4% pay credits, the 8.5% credits have zero effect on the amount of a participant's accrued benefit. *Id.* (presenting hypothetical example to account for 4% pay credits).

REASONS FOR DENYING THE PETITION

The petition presents nothing more than a fact-bound expression of disagreement with the Seventh Circuit (and the district court that ruled the same way). Petitioners' misconstruction of the particular circumstances of Old Monsanto's conversion to a cash balance plan and the operation of the Prior Plan Account is unworthy of review. The Seventh Circuit's ruling creates no split of authority because, contrary to petitioners' assertion, no court has held that a credit to an account is a "benefit accrual" within the meaning of ERISA where the credit has no effect on a participant's previously accrued benefit. The Seventh Circuit's rejection of petitioners' effort to characterize the 8.5% credits on the Prior Plan Accounts as something other than the restoration of an early retirement discount was both correct and consistent with all case law and regulations. This case presents no issue of continuing significance given the unique conversion methodology that produced this plan provision. A dispute over how to characterize the credits to a particular account in the particular plan at issue in this case hardly warrants a writ of certiorari. The petition should be denied.

1. *There is no split of authority.* As petitioners acknowledge, the Seventh Circuit held that the 8.5% credits at issue in this case "were not part of the participant's 'benefit accrual' because they had 'no impact on the accrued benefit at normal retirement age' or 'effect on an employee's rate of benefit accrual.'" Pet. 10 (quoting Pet. App. 15a). The Seventh Circuit recognized that a nominal addition to a participant's hypothetical account (such as the 8.5% credit at issue here) is not a "benefit accrual" if the accrued benefit that the participant had already earned is left unchanged by the credit. Petitioners assert, however, that four courts of appeal have held that the effect of a credit on the participant's accrued benefit is irrelevant. According to petitioners, those cases have "broadly construed benefit accrual as encompassing *everything* credited to a cash balance account." *Id.* at 12 (emphasis added).

Petitioners are wrong. No court has held that a credit to a cash balance account that has no effect on the participants' accrued benefit is a "benefit accrual" within the meaning of ERISA.

Petitioners claim that there is a conflict between the decision in this case and the Seventh Circuit's previous decision in *Cooper* (Pet. 2, 3, 13), even though the Seventh Circuit itself discussed *Cooper* at length in its opinion below and explained that there is no conflict, Pet. App. 8a-10a. The *Cooper* court explained that "benefit accrual" means "the rate at which value is added" to a participant's accrued benefit. 457 F.3d at 639. A credit is a "benefit accrual" only if it is an "addition to the pot," that is, a contribution that increases the amount of the benefit the employee has already earned. *Id.* at 641. In *Cooper*, there was no question that the credits to the account added to the participants' accrued benefit,

and thus constituted "benefit accruals." Because the characterization of the credits as "benefit accruals" was not disputed, the Seventh Circuit's opinion nowhere suggests or even discusses whether the credits would have been "benefit accruals" had they not added to the participants' accrued benefit.[1] No member of the Seventh Circuit voted to rehear this case *en banc* in the face of petitioners' argument that the decision below conflicts with *Cooper*. The Seventh Circuit understood the two cases to be consistent, and they are.

The decisions of the other courts of appeals that petitioners claim conflict with the Seventh Circuit's decision below are, in relevant respects, identical to *Cooper*. All concerned a cash balance plan that, like the one in *Cooper*, guaranteed interest credits through normal retirement age. *Hurlic*, 539 F.3d at 1027; *Register*, 477 F.3d at 60; *Drutis*, 499 F.3d at 613. As discussed above, the interest credits in those cases increased a participant's accrued benefit. Petitioners rip quotations from those decisions completely out of context to argue that they stand for a rule that *any* addition to a participant's hypothetical account balance is a "benefit accrual" even if that addition has no effect on the participant's accrued benefit. *See* Pet. 3-4. These courts have not—and no court anywhere has—adopted such a rule.

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[1] The issue in *Cooper* was whether a plan provision guaranteeing interest credits through normal retirement age discriminated on the basis of age because younger workers would enjoy the benefit of compounding interest over a longer period. The Seventh Circuit rejected the plaintiffs' claim because it treated the time value of money as age discrimination, which is neither required by the statute nor sensible. *Cooper*, 457 F.3d at 638-39.

It is true that the Ninth Circuit, in *Hurlic*, defined "benefit accrual" as "the process by which benefits increase." 539 F.3d at 1037. But the "benefits" that "increased" in that case were the accrued benefits that participants had actually earned, *id.*[2] Likewise, it is true that the Third Circuit in *Register* said that benefit accrual "refers to the credits deposited into the participant's cash balance accounts." 477 F.3d at 68. The interest credits in that case, however, similarly added to the participant's accrued benefit; they were true "inputs" to the account. *Id.* In addition, the Sixth Circuit, in *Drutis*, stated that benefit accrual "refers to the employer's contribution to a plan," 499 F.3d at 614, but again the "contribution" in that case referred to an amount that actually increased the accrued benefit, *id.* at 614-15. None of these courts held or even suggested that "benefit accrual" includes a credit, such as the one in this case, that adds nothing to a participant's accrued benefit, but merely restores the discount taken to provide an early retirement option. The credit in this case does not "increase" the value of the participant's benefits (*Hurlic*), does not "deposit" any value in the participant's hypothetical account (*Register*), and does not "contribute" any value beyond that which the participant has previously earned (*Drutis*).

None of the decisions cited by Petitioners stand for the proposition of law that they try to read into them, *i.e.*, that any credit, regardless of its purpose and function, must be a "benefit accrual." Indeed, none of those courts even considered the kind of credit at

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[2] Likewise, the *dicta* in *Hurlic* cited by Petitioners, explaining that it would "clearly" be age discrimination to reduce or cease "benefits" at a certain age, presupposes that the "benefits" reduced or ceased are the sort of credits that actually add to the participant's accrued benefit. 539 F.3d at 1032.

issue in this case: a credit that functions exclusively to restore a notional discount that facilitated an early retirement option. In contrast, as the Seventh Circuit recognized, the Eighth Circuit's decision in *Atkins* actually involved the restoration of an early retirement discount. And the court in that case, like the courts below, concluded that the reversal of "early retirement discounts" did not reflect additional benefit accruals. *Atkins*, 967 F.2d at 1201.

2. *This case presents no issue of general or continuing significance.* Petitioners concede that the plans' provisions relating to the 8.5% credits are unique, Pet. 8, an argument they emphasized below. Petitioners nevertheless argue that the resolution of this case will somehow have "a profound effect on all employers, sponsors, and employees who participate in benefit plans governed by ERISA." *Id.* at 2. In fact, the true point of contention between the parties concerns how to characterize the 8.5% credits in the isolated context of a conversion methodology coupled with specific enhancements to a benefits package which, according to petitioners, do not exist in any other plan. There is no need for this Court to involve itself in the peculiar circumstances of this case, which has no significance beyond the parties.

Petitioners contend that the critical determination in the Seventh Circuit's ruling concerns whether the 8.5% credits at issue in this case were "additions to the participant's hypothetical account for the plan year" or merely "act to reverse early retirement discounts." Pet. 10. This is not correct. The Seventh Circuit did not examine whether the 8.5% credits were additions to the *account balance*—there was no dispute that they were—but rather whether they were "benefit accruals" that added to the accrued benefit. The Seventh Circuit, like the district court,

fully considered not only the plan language but the explanatory materials provided to participants in advance of the conversion date. It concluded that these credits do nothing more than reverse the 8.5% discounting taken from initial Prior Plan Account balances for those participants under age 55. Pet. App. 14a. Petitioners' baseless disagreement with that reading of the plan language and other documents presents a highly factbound question that does not merit this Court's review.

Petitioners recast their baseless disagreement with the Seventh Circuit when they argue that the 8.5% credits applied to a participant's Prior Plan Account are benefit accruals because if the credits continued until the participant reached age 65, then they would increase the participant's available benefit at retirement. This argument amounts to nothing more than the unremarkable statement that *if* the 8.5% credits did not merely restore the 8.5% early retirement discount, and *if* they in fact were benefit accruals, then they would add to participants' accrued benefits. But, as discussed above, the 8.5% credits merely restore the 8.5% discount and do not add to participants' accrued benefits. This argument is completely untethered to the facts of this case.

Petitioners dig even deeper into the particulars of Old Monsanto's plan when they argue *ipse dixit* that they should have prevailed because it is an "incontrovert[i]ble fact" that the 8.5% credits combined with the 4% pay credits "are necessarily a benefit accrual." Pet. 17-18. Not only are petitioners expressly asking for mere error correction on a matter of "fact," petitioners wrongly treat the fact as uncontroverted, and ignore that the Seventh Circuit expressly demonstrated why petitioners have that fact wrong. As the Seventh Circuit explained,

petitioners' argument here "fails as a matter of mathematics." Pet. App. 12a n.4. Even after factoring in the effect of the 4% pay credits (which do not cease upon reaching any age), the Seventh Circuit explained that the 8.5% credits *never* add to a participant's accrued benefit. Petitioners have not (and cannot) explain mathematically how their argument makes any sense.

Petitioners also assert that the decision conflicts with Treasury Department regulations proposed in 2002. Pet. 13. It is difficult to imagine an argument of less going-forward significance than the interpretation of a *proposed* regulation that the agency never adopted. Moreover, the Seventh Circuit itself considered the proposed regulation and concluded that, had it been adopted, it would have supported the court's view that a benefit accrual occurs only when there is an increase in the participant's accrued benefit. Pet. App. 9a. Petitioners' disagreement with the Seventh Circuit's interpretation of a regulation that was never adopted is no reason for the Court to review this case.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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February 14, 2010

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